Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	
Appropriate Framework for Broadband Access to the Internet over Wireline Facilities	CC Docket No. 02-33
Universal Service Obligations of Broadband Providers	
Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements	CC Dockets Nos. 95-20, 98-10

Comments of the Information Technology Association of America

Jonathan Jacob Nadler
Angela Simpson
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Box 407
Washington, D.C. 20044
(202) 626-6838

Counsel for the Information Technology Association of America

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SUMMARY

The Commission has proposed a radical departure from the pro-competitive regime adopted in the *Second Computer Inquiry* and endorsed by Congress in the Telecommunications Act. The Commission simultaneously proposes to free incumbent local exchange carriers ("ILECs") from fundamental legal and regulatory safeguards, while imposing a range of common carrier obligations on competitive information service providers ("ISPs"). The Commission's proposals are impermissible as a matter of law and unsound as a matter of policy.

The Commission Should Preserve – and, Indeed Strengthen – the Pro-competitive Regulatory Regime Applicable to Wireline Telecommunications Used to Provide Broadband Information Services

Classification of wireline broadband services. The *Notice* is written as if the Commission had not previously considered the regulatory requirements applicable to broadband Internet access service. The Commission, however, has long recognized that the regulatory regime adopted in *Computer II* is fully applicable to broadband services. Thus, the Commission has repeatedly classified broadband transmission services as basic telecommunications. At the same time, the Commission has consistently held that Internet access service constitutes an information service. Under the *Computer II* rules, a facilities-based carrier that seeks to provide information services must unbundle the telecommunications functionality that it uses to provide the information services, offer it as a telecommunications service, and take the service on the same tariffed terms as non-affiliated ISPs.

Preserve the ILECs' unbundling obligation. The Commission cannot eliminate the existing unbundling requirement. Section 202 of the Communications Act – which prohibits all carriers from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service – imposes an independent unbundling obligation, in addition to that contained in the *Computer II* rules, that the Commission cannot forebear from applying.

In any case, eliminating the ILECs' unbundling requirement would be unwise policy. Despite the significant changes that have occurred in the two decades since the Commission issued the *Computer II Final Decision*, the ILECs retain the ability and incentive to use their dominant position in the telecommunications services market to harm competition in the information services market. The unbundling requirement is one of the most powerful safeguards against competitive abuse. Consistent with congressional policy, the Commission should continue to vigorously enforce requirements intended to promote competition in the information services market – rather than eliminating existing regulation in the hope that, free to do as they please, dominant operators will choose to deploy additional broadband facilities.

Continue to apply existing regulation to the ILECs, do not extend it to ISPs. The Commission should also make clear that it will continue to apply to broadband telecommunications services the existing regulatory requirements designed to ensure network reliability/interoperability and protect consumers. In addition, the Commission should continue to require ILECs to unbundle network elements used to provide broadband telecommunications services, such as DSL, which can be used to provide wireline broadband Internet access services. The Commission, however, should not seek to use its authority under Title I of the Communications Act to selectively apply common carrier obligations to ISPs. Rather, the Commission should continue to allow market forces to regulate ISPs' conduct.

Replace the failed ONA/CEI regime. The Commission's Open Network Architecture regime has failed. Indeed, ONA is irrelevant to broadband ISPs. The Commission should replace the ONA/CEI regime with a new regime that gives ISPs a limited right to purchase specified features and functions of the ILECs' networks that can be used to provide information services, on an unbundled basis, at just and reasonable prices.

Reaffirm existing preemption policies. The Commission should reaffirm that its preemption of State common carrier regulation of *non-carrier-provided* information service providers, adopted in *Computer II,* remains in effect, while making clear that it will preempt State regulation of *carrier-provided* information services that would "thwart or impede" pro-competitive Federal policy. At the same time, the Commission should allow the States to supplement Commission enforcement and consumer protection efforts.

The Commission Cannot Require Broadband Internet Access Service Providers to Make Direct Payments to the Universal Service Fund

Remarkably, at the same time the Commission is considering freeing the ILECs from their fundamental duties as common carriers, the Commission is also considering imposing one of the most basic common carrier obligations – the duty to make direct payments to the Universal Service Fund ("USF") – on non-regulated broadband Internet Service Providers. The Commission should decline to do so.

ISPs do not "provide" telecommunications. Section 254(d) of the Communications Act allows the Commission to require "*provider[s]* [of] interstate telecommunications . . . [to] contribute" to universal service. As the Senate Committee Report that accompanied in Telecommunications Act explained, "Information Service Providers," do not 'provide' telecommunications services; they are users of telecommunications services." Therefore, the Commission cannot require them to make direct payments to the USF. The possibility that an ISP may deploy its own "last mile" wireline transmission facilities does not change the analysis. As the Commission correctly observed in the *Notice,* an ISP "offering . . . service over its own facilities does not offer 'telecommunications' to anyone."

Until the Commission determines whether the transmission functionality that a cable system operator provides to a non-affiliated ISP constitutes "telecommunications," it would be premature to determine whether cable system operators should be required to make USF payments. In any case, the Commission cannot require ISPs that provide service over a cable system to make direct payments to the USF because, as the agency recently concluded, "cable modem service" does not include the "offering of a telecommunications service to subscribers."

No adequate justification. The Commission's professed concerns regarding the sufficiency of the USF "funding base" does not provide an adequate justification for requiring ISPs to make direct payments to the USF. In particular, there is no evidence that Internet telephony is having any discernible impact on carriers' end-user telecommunications service revenue. In any case, adoption of a connection-based assessment methodology would obviate any concern about the long-term sufficiency of the USF.

Nor can the Commission rely on the need to ensure "competitive neutrality." While ISPs generally are not required to make direct payments to the USF, they make significant contributions to the advancement of universal service through the payments that they make to their carriers. Requiring them to make direct payments to the USF would subject ISPs, alone among all users, to "double payment" obligations – the very opposite of competitive neutrality.

Requiring "facilities-based ISPs" to make direct payments to the USF based on the value of the telecommunications that they "provide to themselves" would represent an unprecedented expansion of the Commission's exercise of its "permissive" authority. Until now, the Commission has carefully limited the obligation to make direct payments to the USF to common carriers and to those entities that compete directly against common carriers in the provision of telecommunications to third parties on a commercial basis. Facilities-based ISPs, of course, do not compete against common carriers in the provision of telecommunications.

Concerns about competitive neutrality also do not provide a basis for requiring cable system operators that provide Internet access service to make direct payments to the USF. Competitive neutrality does not require identical treatment of all market participants. Cable system operators have their own set of regulatory burdens – such as the duty to pay franchise fees and to devote capacity to public interest, educational, and government programs.

Adverse consequences. Requiring ISPs to make direct payments to the USF would have several adverse consequences. Doing so would constitute regulation of the Internet, which would be inconsistent with express congressional policy. Treating ISPs as telecommunications providers, rather than users, for universal service purposes, would also undermine the basis of the so-called "ESP exemption" – under which ISPs are entitled to access the local network on the same terms and conditions as other users, rather than having to pay the same above-cost carrier access charges as interstate interexchange carriers. Finally, if the Commission were to determine that ISPs should be like telecommunications carriers for universal service purposes, it would be more difficult for the U.S. Government to counter the arguments made by other countries that advocate imposition of another form of carrier regulation – the international settlements system – on the Internet.

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Comments of the
Information Technology Association of America

The Information Technology Association of America ("ITAA") hereby files these comments in response to the Commission's Notice of Proposed Rulemaking ("*Notice*") in the above-captioned proceeding.[1]

INTRODUCTION

The Commission has proposed a radical departure from the pro-competitive regime adopted in the *Second Computer Inquiry* and endorsed by Congress in the Telecommunications Act. The Commission simultaneously proposes to free incumbent local exchange carriers ("ILECs") from fundamental legal and regulatory safeguards, while imposing a range of common carrier obligations on competitive information service providers ("ISPs"). The Commission's proposals are impermissible as a matter of law and unsound as a matter of policy.

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[1] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities;* Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002) ("*Notice*").

The Commission cannot justify its proposals to eliminate the established safeguards governing the ILECs' participation in the broadband information service market on the grounds that the broadband telecommunications services market is competitive. As ITAA and other parties demonstrated in the *ILEC Broadband Dominance* docket, ISPs remain critically dependent on the ILECs for the telecommunications services necessary to provide broadband information services. Rather, the Commission's proposals appear to reflect a misguided belief that massive deregulation – rather than continued efforts to promote competition – offers the best means to spur broadband deployment.

At the same time, the Commission has failed to provide a valid basis for its proposals to extend common carrier regulation to currently unregulated ISPs. The Commission's proposal to use its Title I authority to impose "consumer protection" and "interoperability" requirements on ISPs would represent a complete abandonment of the agency's long-standing recognition that reliance on competitive forces is the best means to ensure that the information services market operates in a manner that serves the public interest. Similarly, requiring ISPs to make direct payments to the Universal Service Fund ("USF") would be directly inconsistent with the Commission's long-standing recognition that ISPs are *users*, rather than *providers*, of telecommunications services. The Commission should not adopt these ill-conceived proposals.

STATEMENT OF INTEREST

ITAA is the principal trade association of the computer software and services industry. ITAA has 500 member companies located throughout the United States, ranging from major multinational corporations to small, locally based enterprises. ITAA's members include a significant number of ISPs, which have long been – and remain – critically dependent on telecommunications services provided by ILECs. Therefore, during the last three decades, ITAA (and its predecessor, ADAPSO) has participated actively in Commission proceedings governing the obligations of the Bell Operating Companies ("BOCs") and other ILECs to offer basic telecommunications services used to provide Internet access and other information services on a just, reasonable, and non-discriminatory basis. These proceedings include all three of the *Computer Inquiries* and the *Open Network Architecture, Competitive Carrier, Interexchange Marketplace, Local Competition,* and *Advanced Services* proceedings. ITAA recently filed comments in the Commission's *ILEC Broadband Non-Dominance* and *Universal Service* dockets, which address issues that are closely related to those raised by this proceeding.

I. THE COMMISSION SHOULD PRESERVE – AND, INDEED, STRENGTHEN – THE PRO-COMPETITIVE REGULATORY REGIME APPLICABLE TO WIRELINE TELECOMMUNICATIONS USED TO PROVIDE BROADBAND INFORMATION SERVICES

The Commission initiated this proceeding to examine "the appropriate legal and policy framework . . . for broadband access to the Internet provided over domestic wireline facilities."[2] As the Commission has long recognized, the existing regulatory regime applicable to the provision of information services, which was adopted in the *Second Computer Inquiry*,[3] is fully applicable to broadband Internet access services provided over wireline telecommunications networks. Because ISPs remain critically dependent on access to telecommunications services provided by ILECs, the Commission should preserve – and, indeed, strengthen – this regime.

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[2] *Notice* ¶ 1.

[3] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II Final Decision*"), *on recon.*, 84 F.C.C.2d 50 (1980), *further recon.*, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied sub nom. Louisiana Pub. Serv. Comm'n v. FCC*, 461 U.S. 938 (1983).

Specifically, the Commission should:

- reaffirm that the *Computer II* regime is fully applicable to broadband services and that, under that regime, wireline broadband Internet access services are classified as information services;

- continue to require ILECs to unbundle, and offer as a tariffed service, the broadband telecommunications functionality that they use to provide information services;

- continue to apply Title II requirements – including the Section 251 unbundling requirement – to ILEC-provided broadband telecommunication services, while refraining from extending common carrier regulation to ISPs;

- replace the failed Open Network Architecture/Comparably Efficient Interconnection regime with a system that ensures that ISPs can access ILEC network features and functions necessary to provide broadband information services; and

- reaffirm that States are preempted from regulating non-carrier-provided information services, and that the Commission will preempt any State regulation of carrier-provided information services that, as a practical matter, thwarts or impedes pro-competitive Federal policy.

A. The "Basic/Enhanced Dichotomy" – Established in *Computer II* and Codified in the Communications Act – is Fully Applicable to Broadband Services

The *Notice* is written as if the Commission had not previously considered the regulatory requirements applicable to broadband Internet access services. [4] Rather than re-iterating established precedent, the *Notice* begins with a series of "tentative conclusions." The *Notice* first tentatively concludes that the provision of "wireline broadband Internet access service" is an information service, even when provided by an entity over its own facilities.[5] The *Notice* next

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[4] *See, e.g., Notice* ¶ 14 (The regulatory status of wireline broadband Internet access services is "not fully resolved.").

[5] *Id.* ¶¶ 17-24.

tentatively concludes that "the transmission component of the end-user wireline Internet access service provided over [an entity's] facilities is 'telecommunications' and not a 'telecommunications service.'"[6] Finally, the *Notice* tentatively concludes that "an entity is providing a 'telecommunications service' to the extent that such entity provides only broadband transmission on a stand-alone basis, without a broadband Internet access service."[7] While the Commission acts as if these are new or controversial issues, there can be little doubt – under the Communications Act and long-established Commission precedent – that the Commission's "tentative conclusions" are correct.

1. The *Computer II* regime

The Commission adopted the regulatory regime applicable to wireline information services in the *Second Computer Inquiry.* The *Computer II Final Decision,* issued in 1980, established a "bright line" distinction between basic telecommunications and enhanced services.[8] Under the *Computer II* regime, the Commission classified as "basic services" those services offered over a telecommunications network that constitute "a pure transmission capability over a communications path that is virtually transparent."[9] By contrast, the Commission classified as "enhanced services" those services offered over the telecommunications network that combine basic telecommunications with computer processing in order to provide services that are "more than a basic transmission."[10]

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[6] *Id.* ¶ 25.

[7] *Id.* ¶ 26.

[8] *See Computer II Final Decision,* 77 F.C.C.2d at 417-35.

[9] *Id.* at 420.

[10] *Id.*

The Commission concluded that, because the market for enhanced services was competitive – with "literally thousands of . . . vendors offering competing services" – it would be neither necessary nor appropriate to extend Title II regulation to the enhanced services market.[11] The Commission further concluded that, because enhanced service providers depend on telecommunications to provide services, facilities-based carriers must unbundle the basic services that they use to provide enhanced services and to make them available – to both affiliated and non-affiliated ISPs – on a just, reasonable, and non-discriminatory basis.[12]

At the time the Commission issued the *Computer II Final Decision,* all carriers were required to provide interstate basic services pursuant to tariff. Because the Commission required AT&T and GTE (and, following the AT&T Divesture, the BOCs) to provide information services through structurally separate affiliates, their enhanced services affiliates purchased basic services under the same tariffed terms as other enhanced service providers ("ESPs"). Other facilities-based carriers, which were not subject to the structural separation requirement, were required to take "transmission-at-tariff" when they used their own basic services to provide an enhanced service.[13]

In adopting the Telecommunications Act, Congress codified the Commission's "basic/enhanced dichotomy" – although Congress chose to use the terms "telecommunications"

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[11] *Id.* at 426.

[12] *See id.* at 474-475.

[13] *Id.* Under the "transmission-at-tariff" requirement, a carrier that uses its own facilities to provide enhanced services must impute to its enhanced service operation the same tariffed rates that the carrier charges non-affiliated enhanced service providers.

and "information service," which it "borrowed" from the AT&T Divesture Decree.[14] The Commission subsequently recognized that Congress intended "all of the services that the Commission has previously considered to be 'enhanced'" to be included in "the statutory definition of 'information services.'"[15]

2. Application to broadband services

In the *Notice,* the Commission suggests that broadband Internet access is fundamentally different from earlier generations of information service, which were provided over narrowband telecommunications networks. Therefore, the Commission contends, applying the existing regulatory regime to broadband Internet access is especially "challenging" – and, indeed, may not be appropriate.[16] This contention is incorrect.

Broadband telecommunications services. The Commission has long recognized that the regulatory regime adopted in *Computer II* is *fully applicable* to broadband services. Thus, the Commission has repeatedly classified broadband transmission services as basic telecommunications, and required facilities-based carriers to offer these services on an unbundled and tariffed basis. For example, in the *Frame Relay Order,* the Commission affirmed

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[14] *See Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11520-24 (1998) ("*Report to Congress on Universal Service*") (The legislative history does not indicate that, in enacting the Telecommunications Act, Congress intended to "overturn" the "*Computer II* framework [which] had been in place for sixteen years."). The Telecommunications Act's definitions of both "telecommunications" and "information services" were taken, in all relevant respects, from the Modification of Final Judgment ("MFJ"). The definitions contained in the MFJ, in turn, were taken from an earlier Senate bill, S. 898 § 103(19), 97th Cong., 1st Sess. (1981) that was introduced in order to codify the Commission's *Computer II* basic/enhanced dichotomy. *See* S. Rpt. No. 97-170, 97th Cong., 1st Sess., at 4, 24 (1981). *Compare* 47 U.S.C §§ 153(20) & 153(43) *with United States v. AT&T,* 552 F. Supp. 131, 229 (D.D.C. 1982) (Sections IV.J and IV.O of the MFJ). For simplicity, in the remainder of these comments, ITAA generally will use the terms "telecommunications" and "information services."

[15] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended,* First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21955 (1996).

[16] *Notice* ¶ 13.

that the "regulatory treatment of data communications services is governed by the basic-enhanced service framework established in the Commission's *Computer II* proceeding."[17] Because AT&T's InterSpan frame relay service provided "a pure transmission capability over a communications path," the Commission concluded that it was a basic telecommunications service – and that AT&T, as a facilities-based carrier, was required to unbundle and offer it, as a tariffed service, separately from its enhanced service offerings.[18] In the subsequent *GTE DSL Order,* the Commission recognized that digital subscriber line ("DSL") transport services constitute basic telecommunications that must be offered under tariff.[19] And, more recently, in the *Customer Premises Equipment/Enhanced Services Bundling Order,* the Commission made clear that facilities-based carriers are obligated to unbundle the DSL service that they use to provide wireline broadband Internet access services and, at a minimum, make it available to rival ISPs on just, reasonable, and non-discriminatory terms.[20]

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[17] *Independent Data Communications Manufacturers Association, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service,* Memorandum Opinion and Order, 10 FCC Rcd 13717, 13719 (1995) ("*Frame Relay Order*"); *see also Application of AT&T for Authority under Section 214 of the Communications Act of 1934, as amended, to Install and Operate Packet Switches at Specified Company Locations in the United States,* Memorandum Opinion, Order, and Authorization, 94 F.C.C.2d 48, 55-57 (1983) (Classifying X.25 packet switching as a basic service).

[18] *Frame Relay Order,* 10 FCC Rcd at 13719-22 ("[C]arriers that own common carrier transmission facilities and provide enhanced services must unbundle basic from enhanced services and offer transmission capacity to other enhanced service providers under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations.").

[19] *See, e.g., GTE Telephone Operating Cos. Tariff No. 1, GTOC Transmittal No. 1148,* 13 FCC Rcd 22466 (1998).

[20] *Policy and Rules Concerning the Interstate, Interexchange Marketplace,* Report and Order, 16 FCC Rcd 7418, 7445 (2001) ("*CPE/Enhanced Service Bundling Order*"). The Commission seeks comment as to whether the ILECs' provision of "wholesale" DSL service, designed for larger ISPs, constitutes a telecommunications service. *Notice* ¶ 26. The concept of "telecommunications service," which was adopted as part of the Telecommunications Act, is meant to track the common law concept of common carriage. As the D.C. Circuit made clear in *NARUC II,* an entity "whose service is of possible use to only a fraction of the population may nonetheless be a common carrier" – *i.e.*, may be offering a telecommunications service – "if he holds himself out to serve indifferently all potential users." *National Assn of Reg Util. Comm'rs v. FCC,* 533 F.2d 601 (D.C. Cir. 1976). Because ILECs do – and, indeed, must – provide wholesale DSL service to requesting ISPs on a non-discriminatory basis, the offering plainly is, and should remain, a telecommunications service.

Broadband information services. At the same time, the Commission has consistently held that Internet access service constitutes an information service. As the Commission observed in the *Report to Congress on Universal Service:*

> Internet access services are appropriately classed as information, rather than telecommunication, services. Internet access providers do not offer a pure transmission path; they combine computer processing, information provision, and other computer-mediated offerings with data transport.[21]

There is no doubt that this conclusion is correct. When an ISP combines telecommunications and computer processing to enable its subscribers to access content on the World Wide Web, or to establish their own Websites, the ISP indisputably is providing the subscriber with the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information"[22] – not the simple transmission of user-provided information between user-specified locations.[23] There is also no doubt that a wireline broadband Internet access service constitutes an information service even when the provider

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In the *Missouri/Arkansas Section 271 Order,* the Commission avoided confronting the question of whether an ILEC's failure to unbundle its DSL service, and offer it as tariffed service to *retail* customers, contravened the Communications Act on the grounds that "neither the Act nor Commission precedent explicitly addresses ... the situation where an incumbent LEC does not offer DSL transport at retail, but instead offers only an Internet access service" that incorporates the DSL transport functionality. *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri,* Memorandum Opinion and Order, 16 FCC Rcd 20719, 20759-60 (2001). This assertion is, at best, literally correct. No provision of the Communications Act or Commission precedent "explicitly" addresses an ILEC's obligations to unbundle DSL services that they use to provide Internet access services. However, the unbundling requirements embodied in Section 202 of the Communications Act, *see infra §* I.B.1, and the Commission's *Computer Rules,* plainly require ILECs that use DSL to provide a broadband Internet access service to unbundle it and make it available, as a tariffed service, on a non-discriminatory basis.

[21] *See, e.g., Report to Congress on Universal Service,* 13 FCC Rcd at 11533-36 ("Internet access, like all information services, is provided 'via telecommunications.'")

[22] 47 U.S.C. § 153(20).

[23] *See id.* § 153(43).

owns its own telecommunications facilities.[24] Indeed, the Commission established the basic/enhanced dichotomy for the very purpose of preventing competitive abuse by facilities-based carriers that were seeking to enter the information service market.[25]

There is no basis to conclude that the regulatory status of Internet access services might vary depending on whether a subscriber accesses the service using a broadband wireline telecommunications service, such as DSL, rather than by using a dial-up telecommunications service. To the contrary, prior to this proceeding, the Commission has consistently assumed that broadband Internet access services constitute information services.[26]

ISPs do not provide telecommunications services. The Commission has also long recognized that ISPs are users of telecommunications (or telecommunications services), rather than providers of telecommunications services. The Commission made this abundantly clear in the *Universal Service Report to Congress,* when it observed that:

> Under *Computer II,* and our understanding of the 1996 Act, we do not treat an information service provider as providing a telecommunications service to its subscribers. The service it provides to its subscribers is not subject to Title II, and is

[24] Contrary to the Commission's suggestion, *Notice* ¶ 14, in the *Report to Congress on Universal Service* the Commission considered the regulatory treatment of ISPs that use their own facilities to provide Internet access services. *See Report to Congress on Universal Service* at 11534 n.138 ("When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications.").

[25] *See Computer II Final Decision,* 77 F.C.C.2d at 457-75.

[26] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Notice of Inquiry, 13 FCC Rcd 15,280, 15,292-93 (1998) (noting that the category of information service provider "include[s], but [is] not limited to, the more than 4,000 providers of Internet access" and inquiring as incumbent LECs obligation to provide "advanced telecommunications capability, such as xDSL . . . to independent ISPs").

> categorized as an information service. The information service provider, indeed, is itself a user of telecommunications."[27]

Here again, the Commission's established conclusions are fully applicable to broadband ISPs. An ISP that provides a broadband Internet access service does not provide broadband "telecommunications service" because it does not provide pure broadband transmission "for a fee directly to the public." [28]

The Commission, however, must be precise in its terminology. In some cases, an ISP may deploy its own facilities and use *telecommunications* to provide an information service.[29] Alternatively, the ISP can purchase *telecommunications service* from a facilities-based carrier, which the ISP can use to provide information services to its subscribers. While the ISP's information services could be said to have a "telecommunications component," the ISP does not *provide* either telecommunications or telecommunications service to its subscribers. [30]

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[27] *Universal Service Report to Congress,* 13 FCC Rcd at 11534 n.138.

[28] 47 U.S.C. § 153(46).

[29] As discussed above, in those cases in which a facilities-based carrier seeks to provide information services, the carrier must unbundle the telecommunications functionality that it uses to provide the information services and provide it, as a telecommunications service, both to its affiliated ISP and non-affiliated ISPs.

[30] The proper classification of the "telecommunications component" of an ISP's service was absolutely clear under the *Computer II* structural separation regime. A BOC that wanted to provide an information service was required to establish a separate affiliate. The information service affiliate purchased telecommunications services from the BOC, pursuant to the same tariffs used by non-affiliated ISPs. The information service affiliate, in turn, *used* the telecommunication service to provide a single offering to its customers: unregulated information services. The Commission's waiver of the *Computer II* structural separation requirement, *see infra,* n.45, does not alter this. Today, a BOC (or other ILEC) that provides information services over its own facilities is, in effect, providing a telecommunications service "to itself." The ILEC (just like an non-affiliated ISP) then uses this service to provide an information service to its customers.

B. The Commission Should Continue to Require the ILECs to Unbundle, and Offer as a Tariffed Service, the Telecommunications Functionality That They Use to Provide Their Information Services

The real issue in this proceeding is not how to "classify" broadband wireline Internet access service. As demonstrated above, such services are plainly information services. Nor is there any question that, pursuant to *Computer II,* BOCs and other ILECs "that provide information services" – including broadband Internet access service – "are required to offer the transmission component of the information service separately pursuant to tariff, and must also acquire such transmission for their own information service offerings pursuant to their tariff."[31] The primary issue in this proceeding is whether the Commission can, and should, *eliminate* the existing requirement that the ILECs unbundle, and offer as a tariffed service, the telecommunications functionality that they use to provide information services.

The answer, quite clearly, is that the Commission should not. As demonstrated below, freeing the ILECs from the duty to unbundle the telecommunications functionality that they use to provide broadband Internet access services and making it available as a tariffed service would: (1) violate Sections 201 and 202 of the Communications Act; (2) allow ILECs to impede competition in the information services market; (3) be inconsistent with the pro-competitive policy embodied in the Telecommunications Act; (4) undermine U.S. government efforts to open foreign markets; and (5) lead to reduced competition in the customer premises equipment ("CPE") market.

[31] *Notice* ¶ 42.

1. Sections 201 and 202 of the Communications Act require facilities-based carriers to unbundle the telecommunications functionality that they use to provide information services

Regardless of its policy preferences, the Commission cannot eliminate facilities-based carriers' obligation to unbundle the telecommunications functionality that they use to provide Internet access service, and make it available on non-discriminatory terms, because doing so would violate the Communications Act.

Section 202(a) of the Act prohibits carriers – whether dominant or non-dominant – from engaging in "unjust or unreasonable discrimination" in the provision of a telecommunications service.[32] The Commission has held repeatedly that this provision imposes an independent obligation, separate from the one contained in the *Computer II Rules,* that requires any facilities-based carrier that provides information services to unbundle the transmission capacity underlying its information services and make that capacity available to competing ISPs on a non-discriminatory basis.[33]

Consistent with this principle, in the *Interexchange Marketplace Reconsideration Order,* adopted in 1995, the Commission observed that – in addition to the *Computer II* unbundling requirement – "section 202 of the Act prohibits [facilities-based carriers] from discriminating unreasonably in [the] provision of basic services" to non-affiliated ISPs.[34] Similarly, in the *Frame Relay Order,* which held that the *Computer II* rules required AT&T to unbundle its basic frame relay service, the Commission noted that "Section 202 of the Act *also* prohibits a carrier

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[32] 47 U.S.C. § 202(a).

[33] *See, e.g., CPE/Enhanced Service Bundling Order,* 16 FCC Rcd at 7445.

[34] *Competition in the Interstate Interexchange Marketplace,* Memorandum Opinion And Order On Reconsideration, 10 FCC Rcd 4562, 4580 & n.72 (1995).

from discriminating unreasonably in its provision of basic services."[35] And, just last year, in the *CPE/Enhanced Service Bundling Order,* the Commission re-iterated that "all carriers have a firm obligation under section 202 of the Act to not discriminate in their provision of transmission service to competitive internet or other enhanced service providers."[36] The Commission further observed that "discrimination . . . that favor[s] one competitive enhanced service provider over another or the carrier, itself, [is also] an unreasonable practice under section 201(b) of the Act."[37]

The Commission cannot eliminate this statutory obligation through the use of its forbearance power. Section 10 of the Communications Act, which is the Commission's sole source of forbearance authority,[38] does not allow the Commission to forebear from imposing any statutory provision necessary to ensure that a carrier's charges or practices are not "unreasonably discriminatory."[39] At most, the Commission could eliminate the requirement that non-dominant carriers, which may no longer file tariffs, take "transmission-at-tariff" when they use their own telecommunications services to provide information services. In such cases, however, the carrier would still be required to unbundle the telecommunications functionality that it uses to provide information services and make it available on non-discriminatory terms.[40]

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[35] *Frame Relay Order,* 10 FCC Rcd at 13719 (emphasis added).

[36] *CPE/Enhanced Service Bundling Order,* 16 FCC Rcd at 7445.

[37] *Id.* at 7445-46.

[38] *See ASCENT v. FCC,* 235 F.3d 662 n.7 (D.C. Cir. 2001) (noting the Commission's conclusion that Section 706 of the Telecommunications Act is not an independent basis of forbearance authority).

[39] 47 U.S.C. § 160(a)(1).

[40] An ISP that believed that a non-dominant carrier was engaging in "unreasonable discrimination" in the provision of a telecommunications services, would retain the ability, pursuant to Section 208 of the Communications Act, 47 U.S.C. § 208, to file a compliant with the Commission.

2. Eliminating the unbundling requirement would allow the ILECs to impede competition in the information services market

Even if the Commission had the legal authority to do so, eliminating the requirement that the ILECs unbundle the telecommunications functionality that they use to provide information services, and offer it as a tariffed service, would be unwise policy because it would harm competition in the information services market.

In *Computer II,* the Commission imposed structural separation and unbundling requirements on AT&T and GTE (and, following divestiture, on the BOCs) in order to prevent them from using their market power in the market for local telecommunications services to harm competition in the market for information services.[41] In its comments in the *ILEC Broadband Dominance* proceeding, ITAA demonstrated that – despite the introduction of CLEC competition and the growth of services that allow *end-users* to obtain broadband Internet access services from cable and wireless providers – ILECs retain the ability and incentive to use their market power in the provision of *wholesale* mass-market broadband telecommunications services, such as DSL, to harm competition in the information services market.[42] As ITAA explained:

> [T]he ILECs are the dominant providers of DSL services, with an estimated 93 percent market share. The ILECs also are major participants in the "down-stream" market for broadband mass-market Internet access services. Therefore, the ILECs have both the ability and the incentive to provide DSL services to non-affiliated ISPs on unreasonable and discriminatory prices, terms, and conditions, thereby subjecting rival ISPs to a classic "price squeeze." The ILECs' ability to act anti-competitively is not constrained by intra-modal competition. At present, only about seven percent of all DSL lines are provided by a CLEC. . . . Nor is the ILECs' market power constrained by inter-modal competition.

[41] *See Computer II Final Decision*, 77 F.C.C.2d at 474-75.

[42] Initial Comments of the Information Technology Association of America, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services,* CC Docket No. 01-337 (filed Mar. 1, 2002).

> Cable systems are under no legal obligation to – and, in practice, do not – provide wholesale broadband transport services to ISPs. At most, an ISP may be able to negotiate a commercial agreement to "partner" with the cable system operator. Other delivery platforms, such as satellite and wireless, are still in the earliest stages of deployment."[43]

In its reply comments, filed in the same docket, ITAA elaborated on the means by which, in the absence of appropriate regulation, an ILEC could use its dominant position in the market for wholesale mass market broadband telecommunications service to impede competition in the broadband Internet access services market. ITAA explained that:

> In the absence of rate regulation, an ILEC could rationally charge significantly above-cost prices for wholesale DSL service in order to subject non-affiliated ISPs to a price squeeze. If the ILEC were to do so, its downstream ISP could absorb the increased cost and, therefore, continue to offer a competitively priced Internet access service. By contrast, non-carrier-affiliated broadband ISPs – which have few, if any, alternative sources of supply – would have no choice but to pass the higher DSL costs on to their customers. This, in turn, would encourage many of the non-carrier-affiliated broadband ISPs' customers to switch to the lower-priced service provided by the ILEC's affiliated ISP. Over time, this would be likely to force many non-carrier-affiliated broadband ISPs to exit the market.
>
> Because competition in the Internet access market is imperfect, once the ILEC drove non-carrier-affiliate ISPs out of the market, it would be able to raise the price of its basic Internet access service. In some markets, consumers would have no alternate provider of broadband Internet access services. While consumers in other markets might have the option of switching to a cable-based Internet access service, many would be deterred from doing so as a result of long-term contracts signed with the ILEC or because of the investment they had made in DSL premises-based equipment.[44]

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[43] *Id.* at i-ii.

[44] Reply Comments of the Information Technology Association of America, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, at 8-9 (filed Apr. 22, 2002).

ITAA's comments make clear that, despite the significant changes that have occurred in the two decades since the Commission issued the *Computer II Final Decision*, the fundamental reality remains the same: the ILECs retain the ability and incentive to use their dominant position in the telecommunications services market to harm competition in the information services market.

The Commission has wrongly taken the position that the BOCs are no longer subject to the *Computer II* structural separation requirement.[45] As a result, one of the most powerful safeguards against competitive abuse is the requirement that all ILECs unbundle the telecommunications functionality that they use to provide information services, offer it as a tariffed service, and take "transmission-at-tariff" when they use their own facilities to provide

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[45] As ITAA has explained previously, the Commission has fundamentally misconstrued the Ninth Circuit's decision in the *California III* case, *California v. FCC*, 39 F.3d 919 (9th Cir. 1994) *cert. denied*, 115 S. Ct. 1427 (1995). In that case, the court considered three issues: (1) the legality of the Commission's decision, in the *Computer III Remand Order*, to replace the structural safeguards of *Computer II* – which the Commission had previously determined were necessary to deter BOC cross-subsidization and access discrimination – with nonstructural safeguards; (2) the legality of the Commission's revised rules governing the use of Customer Proprietary Network Information; and (3) the legality of Commission's decision to preempt certain State regulations. *See California III*, 39 F.3d at 930. In its decision, the court held that, while the Commission had adequately demonstrated that non-structural safeguards were adequate to deter BOC cross-subsidization, the:

> FCC has failed to explain or justify its change in policy regarding nonstructural safeguards against access discrimination. For this reason, . . . that portion of [the FCC's] order is arbitrary and capricious. We uphold those portions of the *Order on Remand* that implement CPNI rules and that preempt State regulations.

Id. at 933. As was the case after *California v. FCC*, 905 F.2d 1217 (9th Cir. 1990) ("*California I*") when the court found that the Commission had not adequately justified its initial decision to lift structural separation, the effect of *California III* was to return the Commission to the *Computer II* structural separation regime. *See Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 5 FCC Rcd 4714, 4714 (1990) (recognizing that the Ninth Circuit's vacation of the original *Computer III Orders* in *California I* reinstated the *Computer II* regime). The *only* portions of the *Computer III Remand Order* that were not vacated were those dealing with CPNI and preemption. At most, the Commission has "temporarily" waived the effective *Computer II* structural separation requirements, pending its decision in the remand proceeding that the Ninth Circuit ordered in *California III* – a decision that, after more than *seven years*, the Commission has failed to issue. *See Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 10 FCC Rcd 1724, 1730 (1995) ("*Computer II Waiver Order*") ("To the extent that the effect of *California III* might be regarded as returning regulation of BOC enhanced services to the *Computer II* framework . . . we grant any necessary waivers, pending the completion of remand proceedings, so that the BOCs" can provide information services on an integrated basis.").

information services. If the Commission lifts this requirement, the inevitable result will be to reduce competition in the market for broadband Internet access services.

3. Eliminating the unbundling requirement would be inconsistent with the pro-competitive policy embodied in the Telecommunications Act

In light of the above, it is clear that the Commission's proposals cannot be justified on the grounds that the broadband telecommunications services market is competitive. Rather, the Commission's proposals appear to reflect a belief that massive deregulation – rather than continued efforts to promote wireline competition – offers the best means to spur broadband deployment. This approach, however, is both unsound in principle and directly inconsistent with the pro-competitive policies that Congress embodied in the Telecommunications Act.

As an initial matter, there is little need for the Commission to take radical action to promote broadband deployment. Competitive forces have resulted in the deployment of significant broadband capacity in most geographic areas. Indeed, in most locations, there is significantly more broadband supply than demand. While high-speed Internet service is available to approximately 86 million U.S. households, only about 11.5 million homes (11 percent) subscribe to any type of broadband service. By contrast, more than 61 million households have narrowband (dial-up) Internet access.[46] There is, therefore, no justification for the Commission to dismantle existing regulatory provisions designed to promote competition in order to create "incentives" for ILEC deployment. Rather, the Commission's principal goals

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[46] *See* Information Technology Association of America, *Positively Broadband: Building a Positive, Competitive Broadband Agenda,* at 8 (Oct. 2001) *available at* http://www.positivelybroadband.org.

should be to continue to foster competition, while taking actions that will spur consumer demand for broadband services.[47]

In any case, a "deregulation first" approach plainly would be inconsistent with congressional intent. To be sure, Section 706 of the Telecommunications Act, which directs the Commission to take appropriate action to promote broadband deployment, provides for the use of deregulation and forbearance.[48] Congress, however, intended that the Commission only use these tools *after* competition had taken root. Thus, Section 10 of the Communications Act provides that the Commission must determine that a regulation is no longer necessary as the result of meaningful economic competition between service providers *before* exercising its forbearance power.[49] Similarly, in Section 271 of the Act, Congress provided that the BOCs must open their local networks to competition *before* they are permitted to enter the market for in-region, inter-LATA services – and, even then, must do so through a strong separate affiliate designed to deter anti-competitive abuse.[50]

The "competition first" approach adopted by Congress has proven to be correct. Indeed, the Commission has recognized repeatedly that it is the growth of competition – not premature deregulation – that has spurred the growth of broadband deployment. As the Commission found in the *Second Advanced Telecommunications Services Deployment Report,* a significant "factor

[47] The Commission can foster demand by increasing use of "e-government" services, facilitating schools' and libraries' access to on-line educational services, promoting efficient use of spectrum, fostering uniform national rules and policies, and contributing to appropriate law enforcement, consumer protection and disability access initiatives. *See id.* at 18-22.

[48] *See* 47 U.S.C. § 157 nt.

[49] *Id.* at § 160(b).

[50] *Id.* at § 271.

spurring [the] rise in investment [in infrastructure since 1996] appears to be the introduction of competition into the telecommunications market."[51] The "tremendous investment in DSL deployment," the Commission added, was "spurred" by the Commission's regulatory policies regarding the "availability of unbundled network elements and line sharing."[52] More recently, in the *Third Advanced Telecommunications Services Deployment Report,* the Commission re-affirmed that its collocation and "line sharing" rules are intended to "promot[e] investment through competition."[53]

Consistent with congressional policy, and its own precedent, the proper course of action for the Commission is to continue to vigorously enforce its rules intended to promote competition in the information services market – not to eliminate existing regulation in the hope that, free to do as they please, dominant operators will choose to deploy additional broadband facilities.

4. Eliminating the unbundling requirement would undermine efforts to open foreign information service markets

There is another reason why the Commission should not eliminate the ILECs' existing unbundling obligation: doing so would be inconsistent with the United States' international obligations, and could undermine continuing efforts to open foreign markets to U.S. service providers.

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[51] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Second Report, 15 FCC Rcd 20913, 20983 (2000).

[52] *Id.* at 20988.

[53] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* Third Report, 17 FCC Rcd 2844, 2898 (2002).

Existing GATS Obligations. The United States is a signatory of the WTO General Agreement on Trade in Services ("GATS"). Pursuant to this agreement, the United States must ensure all ISPs[54] have "access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions."[55] This provision requires the United States to allow ISPs from other signatory countries to access telecommunications services on "terms and conditions no less favorable than those accorded to any other user of like public telecommunications transport networks or services under like circumstances." [56] Consistent with this requirement, non-carrier ISPs seeking to enter the U.S. market must be able to access an ILEC's telecommunications services on the same prices, terms, and conditions that the ILEC's ISP operations are able to access those services.

Current negotiations. In recent WTO negotiations, the United States has stated that regulation of public telecommunications network operators who also provide "value-added services" – including Internet and Internet access services – is necessary to protect other providers of value-added services that rely on those network operators' facilities and services. For example, the United States has formally proposed in the GATS 2000 and Doha Round negotiations that WTO Members should "address . . . the impact of major suppliers of telephone services expanding into value-added sectors that rely on network facilities and services,

[54] The United States' GATS obligations apply, without limitation, to all providers of enhanced services as defined under U.S. laws and regulations (*i.e.*, including Internet and Internet access services). *See United States – Schedule of Specific Commitments*, General Agreement on Trade in Services, GATS/SC/90 (94-1088) (Apr. 15, 1994), *available at* http://docsonline.wto.org/gen_search.asp.

[55] Annex on Telecommunications, §5(a), General Agreement on Trade in Services, art. XVI, Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, The Legal Results of the Uruguay Round of Multilateral Trade Negotiations: The Legal Texts 325 (GATT Secretariat 1994), *reprinted in* 33 I.L.M. 1167 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/26-gats.pdf ("*GATS Telecom Annex*").

[56] *Id.* at n.2.

specifically those facilities and services at the local level. This may raise the danger of operators extending market power from those telephone networks into new competitive networks."[57] If the Commission were to abandon its long-standing requirements that ILECs allow non-affiliated ISPs to have non-discriminatory access to the telecommunications functionality that they need to provide broadband information services, it would be very difficult for the United States to persuade foreign governments to take measures to ensure that U.S. ISPs that seek to do business in their countries have access to comparable services.

5. Eliminating the unbundling requirement would ultimately reduce CPE competition

While the *Notice* does not specifically address customer premises equipment, the Commission's rationale for eliminating the requirement that the ILECs' unbundle the broadband telecommunications functionality that they use to provide information services could also provide a rationale for eliminating the requirement that the ILECs allow customers to purchase broadband telecommunications services separately from equipment.

In the *CPE/Enhanced Service Bundling Order,* the Commission allowed all carriers to bundle CPE with telecommunications services. The Commission, however, recognized that, because ILECs continue to have market power in the local exchange market, they could "harm CPE competition by requiring customers that purchase local exchange service from them to also purchase CPE." [58] The Commission therefore required ILECs to continue to offer telecommunications "service[s] for which the Commission considers them to be dominant on

[57] Communication from the United States – Market Access in Telecommunications and Complementary Services: the WTO's Role in Accelerating the Development of a Globally Networked Economy, WTO Council for Trade in Services, S/CSS/W/30 (00-5571) (Dec. 18, 2000), *available at* http://docsonline.wto.org/gen_search.asp.

[58] *CPE/Enhanced Service Bundling Order*, 16 FCC Rcd at 7440.

nondiscriminatory terms if they bundle such service with CPE."[59] Consistent with this obligation, the ILECs must allow customers – including ISPs – to purchase a stand-alone telecommunications service.

The Commission apparently now believes that ILECs are subject to competition from other broadband service providers and, therefore, that regulatory intervention generally is not necessary.[60] Based on this rationale, the Commission now proposes to eliminate the requirement that the ILECs unbundle the broadband telecommunications functionality that they use to provide information services. If the Commission does so, the ILECs are likely to argue that there is no reason to require them – alone among all carriers – to provide an "unbundled option" when they offer a bundled package that includes broadband telecommunications service and CPE.

Elimination of the remaining CPE unbundling requirement would allow the ILECs to use their market power in the provision of wholesale mass-market broadband telecommunications services to force non-affiliated ISPs to bundle their service with carrier-specified CPE – thereby enabling the ILECs to become the "gatekeeper" for broadband content delivered to many residential customers. This, in effect, would allow ILECs to prevent consumers from attaching competitively provided CPE to their broadband wireline network, thereby reversing a Commission policy that had its origins in the landmark 1956 decision in the *Hush-a-Phone* case.[61]

Given the Commission's concerns about competitive neutrality, elimination of the CPE unbundling rules could lead the Commission to modify the "navigation device" rules, adopted

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[59] *Id.* at 7440-41.

[60] *See Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, CC Docket No. 01-337, FCC 01-360 , ¶¶ 5-6, 34 (rel. Dec. 20, 2001).

[61] *Hush-a-Phone Corp. v. FCC*, 238 F.2d 266 (D.C. Cir. 1956).

pursuant to Section 629 of the Communications Act.[62] These rules prevent cable system operators from bundling cable service with certain forms of premises-based equipment – such as cable modems and set-top boxes – thereby ensuring user choice, increasing competition, and promoting innovation. The end-result would be to significantly erode the Commission's long established equipment regime, which has benefited consumers by creating robust competition in the market for premised-based equipment used in conjunction with broadband services. The Commission should decline to do so.

C. The Commission Should Continue to Apply Title II Regulation to ILEC-provided Broadband Telecommunications Services, But Should Not Extend These Regulations to ISPs

In the *Notice,* the Commission asks a series of questions regarding the extent to which other existing statutory and regulatory obligations "might be affected by classifying wireline broadband Internet access service as information services."[63] In particular, the Commission seeks comments regarding application to wireline broadband Internet access service of: (1) network reliability/interoperability requirements;[64] (2) "consumer protection" requirements – including the obligation to: (a) obtain Commission approval before discontinuing a telecommunications service;[65] (b) comply with truth-in-billing requirements;[66] and (c) make telecommunications services accessible to the disabled;[67] and (3) ILEC network element

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[62] 47 U.S.C. § 549; *See Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices,* Report and Order, 13 FCC Rcd 14775 (1998).

[63] *Notice* ¶ 54.

[64] *Id.* ¶ 56.

[65] *Id.* ¶ 57.

[66] *Id.* ¶ 58.

[67] *Id.* ¶ 59.

unbundling obligations under Section 251 of the Communications Act.[68] At several points, the Commission suggests that it might be appropriate to use its Title I authority to impose regulatory obligations on wireline broadband Internet service providers.[69] As discussed below, the Commission should continue to apply these requirements to carrier-provided broadband telecommunications services; it should not extend them to ISPs.

1. The Commission should continue to apply reliability/interoperability, "consumer protection," and network element unbundling requirements to telecommunications services used to provide wireline broadband Internet access service

Once again, the Commission acts as if its "tentative conclusion" that wireline broadband Internet access services are information services is a new development that requires the agency to assess, for the first time, how to apply its existing regulatory regime to these services. This, of course, is fundamentally incorrect. As discussed above,[70] there has never been any serious doubt that wireline broadband Internet access services are information services. Therefore, pursuant to the Section 202 Communications Act and the Commission's *Computer II* rules, facilities-based carriers must unbundle, and provide as a service, the telecommunications functionality that they use to provide wireline broadband Internet access services. All existing statutory and regulatory requirements applicable to telecommunications services apply to these unbundled telecommunications services.

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[68] *Id.* ¶ 61.

[69] *See, e.g.*, ¶ 57 (asking whether the Commission should apply Section 214 requirements, which limit the ability of carriers to discontinue service without prior Commission authorization, to wireline broadband Internet access services) & *id.* ¶ 61 (asking whether the Commission should use its Title I authority to impose network element unbundling requirements on all wireline broadband Internet access providers).

[70] *See, supra*, § I.A.

Interoperability/reliability and consumer protection. Consistent with established principles, the Commission should make clear that it will continue to apply existing regulatory requirements designed to ensure network reliability/interoperability and to protect consumers of all telecommunications services – including broadband telecommunications services that facilities-based carriers are required to offer, on an unbundled basis, pursuant to Section 202 and the Commission's *Computer II* requirements. The Commission should also provide appropriate guidance regarding the specific application of these requirements to broadband service.

One of the most critical "consumer protection" requirements is the obligation of a carrier not to discriminate in the provision of telecommunications services.[71] The Commission should use the current proceeding to clarify the application of this obligation to telecommunications services, such as DSL, that the ILECs use to provide broadband wireline information services. In particular, the Commission should make clear that an ILEC must not discriminate in the provision of broadband telecommunication services – in terms of availability, price, deployment intervals, or quality – in favor of customers that also purchase the ILEC's broadband information service or broadband-compatible CPE. Nor should the ILEC be allowed to make ISPs agree to comply with service requirements – other than those necessary to avoid technical harm to the network – in order to be able to purchase the ILEC's unbundled broadband telecommunications service. For example, the ILEC should not be allowed to require an ISP to use ILEC-specified CPE, co-brand its products with the ILEC's service, or otherwise relinquish control over the customer relationship.

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[71] 47 U.S.C. § 202(a).

Network element unbundling. The Commission should also make clear that it will continue to require ILECs to unbundle network elements used to provide broadband telecommunications services, such as DSL, which can be used to provide wireline broadband Internet access services.

The *Notice* reflects significant confusion regarding the ILECs' network element unbundling requirement. Section 251 of the Communications Act requires the ILEC to provide requesting competitive local exchange carriers ("CLECs") with access to network elements the absence of which would impair a CLEC's ability to provide a "telecommunications service."[72] The *Notice* suggests that, if the Commission "classifies" wireline broadband Internet access services as information services, the ILECs would not be required to provide access to unbundled elements of their networks – such as the upper frequency spectrum on the loop – that the ILECs use to provide broadband Internet access services.[73] This is clearly wrong.

As discussed above, wireline broadband Internet access is – and has always been – classified as an information service. As a result, the ILECs have always been required to offer the telecommunications functionality that they use to provide broadband Internet access, such as DSL, as a tariffed telecommunications service.[74] Pursuant to Section 251(c)(3), the Commission has directed the ILECs to allow CLECs to purchase unbundled network elements ("UNEs") – including the upper frequency spectrum on the ILECs' loops – necessary to provide a competing

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[72] 47 U.S.C. § 251(c)(3).

[73] *Notice* ¶ 61.

[74] *See, infra,* § 1.A.

DSL service. CLECs, in turn, can use DSL service to provide their own competing wireline broadband Internet access service. Alternatively, CLECs can sell DSL to non-carrier-affiliated ISPs, which can then use it to provide a wireline broadband Internet access service. The CLECs also can, and do, sell unbundled DSL telecommunications service to other end-users, such as individuals that seek to telecommute.

As the Commission recognized in the *Line Sharing Order*, the ILECs' initial practice of denying CLECs unbundled access to the upper frequency spectrum on the loop not only impeded, but effectively precluded, CLECs' ability to provide DSL-based services.[75] The Commission's decision, in 1999, to require the ILECs to unbundle this network element has significantly accelerated the deployment of DSL services.[76] This, in turn, has benefited ISPs. The Commission's "tentative conclusion" that wireline broadband Internet access service is an information service does not provide a basis for the Commission to reverse its prior decision.

2. The Commission cannot use its Title I authority to selectively impose common carrier obligation on wireline broadband ISPs

While the Commission should continue to apply existing regulatory requirements to carrier-provided broadband telecommunications service, it should not seek to use its authority under Title I of the Communications Act to selectively apply common carrier obligations to information service providers.

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[75] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability;* Third Report and Order, 14 FCC Rcd 20912, 20917 (1999) ("*Line Sharing Order*"), *on recon.*, 16 FCC Rcd 2101 (2001).

[76] A Commission study found that, in the 12 months following the adoption of the *Line Sharing Order,* DSL deployment to residential and small business customers grew by 447 percent, to approximately 1.6 million lines. This is nearly three times faster than the growth rate of broadband cable during that period. *See* Industry Analysis Division, Common Carrier Bureau, *High-Speed Services for Internet Access: Subscribership as of December 31, 2000*, Tables 3-4 (Aug. 9, 2001) *available at* http://www.fcc.gov/wcb/iatd/comp.html.

Contrary to the Commission's apparent assumption, Title I is not a blank check: the Commission may not use Title I as a basis to selectively pick and choose which common carrier regulations it wants to impose on ISPs. Rather, Title I is a limited grant of "ancillary authority." As the Ninth Circuit made clear in *California I,* "Title I is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities . . . In the case of enhanced services, the specific statutory responsibility to which the Commission's Title I authority is ancillary to [is] its Title II authority . . . over common carrier services." [77] The Commission, the court added, cannot evade the limits on its Title II authority "by the talismanic invocation of [its] Title I authority."[78]

Consistent with this principle, the Commission recognized in *Computer II* that:

> Even though an activity falls within our [Title I] jurisdiction, our ability to subject it to regulation is not without constraints. The principal limitation upon, and guide for, the exercise of these additional powers which Congress has imparted to this agency is that Commission regulation must be directed at protecting or promoting a statutory purpose. In some instances, that means not regulating at all, especially if a problem does not exist." [79]

Because, even in 1980, the information market was fully competitive, the Commission recognized that it would be improper to use its Title I authority to impose common carrier regulation on ISPs because doing so "would limit the kinds of services an unregulated vendor could offer, restricting this fast-moving, competitive market." [80] Rather, the Commission

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[77] *California v. FCC,* 905 F.2d at 1241 n.35.

[78] *Id.; see also Southwestern Bell Tel. Co. v. FCC,* 19 F.3d 1475 (D.C. Cir. 1994) (Commission cannot apply Title II regulatory requirements to services over which the agency has only Title I authority).

[79] *Computer II Final Order,* 77 F.C.C.2d at 432-34.

[80] *Id.*

concluded, the proper course was to apply necessary regulation to the carrier-provided telecommunications services necessary to provide information services – which then, as now, were not subject to effective competition – while allowing market forces to regulate ISPs' conduct. This approach has clearly worked. For example, market forces have resulted in universal interconnectivity and interoperability on the Internet.[81] The Commission should continue to adhere to this long-established, sensible, and legally sound approach.

D. The Commission Should Replace Its Failed ONA/CEI Regime With a System That Ensures That ISPs Can Access Network Resources Necessary to Provide Broadband Information Services

In the *Notice*, the Commission asks whether the Open Network Architecture ("ONA") and Comparably Efficient Interconnection ("CEI") rules, which were adopted in the *Third Computer Inquiry,*[82] should be "*imposed* on the BOC provision of broadband Internet access services"[83] or whether "alternative access obligations should be applied."[84] As discussed above, the Commission's generally applicable rules governing BOC provision of information services apply fully to the BOCs' provision of broadband service. Thus, to the extent that the ONA and

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[81] *See* FCC Office of Plans and Policy, *The Digital Handshake: Connecting Internet Backbones*, Working Paper No. 32, at 15-22 (Sept. 2000) *available at* http://www.fcc.gov/opp/workingp.html.

[82] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry),* Report and Order, 104 F.C.C.2d 958 (1986) ("*Computer III Phase I Order*"), *recon.,* 2 FCC Rcd 3035 (1987) ("*Computer III Phase I Reconsideration Order*"), *further recon.*, 3 FCC Rcd 1135 (1988), *on second further recon*, 4 FCC Rcd 5927 (1989); *Computer III Phase I Order and Reconsideration Order vacated sub nom. California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Phase II Order*, 2 FCC Rcd 3072 (1987)("*Phase II Order*"), *recon.,* 3 FCC Rcd 1150 (1988)("*Computer III Phase II* Reconsideration Order"), *further recon.*, 4 FCC Rcd 5927 (1989) ("*Computer III Phase II Further Reconsideration Order*"); *vacated sub nom. California v. FCC,* 905 F.2d 1217 (9th Cir. 1990). *Computer III Remand Proceedings*, 5 FCC Rcd 7719 (1990), *recon.* 7 FCC Rcd 7571 (1991), *recon. dismissed in part*, 11 FCC Rcd 12513 (1996), *vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 1427 (1995); *Computer III Further Remand*, 13 FCC Rcd 6040, *Report and Order*, 14 FCC Rcd 4289, *recon.*, 14 FCC Rcd 21628 (1999).

[83] *Notice* ¶ 47 (emphasis added).

[84] *Id.* ¶ 50.

CEI requirements are in effect,[85] the BOCs must comply with them when they provide broadband services. The question before the Commission, therefore, is not whether to "impose" these requirements – it is whether to *eliminate* them. As ITAA has previously proposed, the Commission should replace the failed ONA/CEI regime with an effective regime that provides ISPs with access to specified unbundled network features and functions at just and reasonable prices.

1. The Commission's ONA/CEI regime has failed

Open Network Architecture. In the original *Computer III Order,* the Commission asserted that, by requiring the BOCs to "fundamentally unbundle" their networks, ONA would serve as a "self-enforcing" means of preventing BOCs from discriminating against rival ISPs that require access to the BOCs' telecommunications services, while allowing non-carrier-affiliated ISPs to make new and innovative uses of the existing monopoly networks.[86] ONA, however, has failed to come anywhere close to achieving these goals. There are two reasons for this. First, the Commission failed to require the BOCs to fundamentally unbundle their networks – instead allowing the BOCs to repackage existing services under new names.[87] And, second, the

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[85] As discussed above, *see, supra,* n.45, the Ninth Circuit's decision in *California III* vacated most of the Commission's *Computer III Orders.* The Commission's ONA and CEI regime are effective as a result of a waiver of the Commission's *Computer II* structural separation requirements granted shortly after the Ninth Circuit's vacation and remand of the Commission's *Computer III Remand Orders* in 1995. *See Computer II Waiver Order,* 10 FCC Rcd at 1729-30.

[86] *Computer III Order,* 104 F.C.C.2d at 1063-64.

[87] *Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 5 FCC Rcd 3103, 3105 (1990).

Commission insisted that any ISP that wants to purchase ONA Basic Service Elements pay above-cost, per-minute carrier access charges.[88]

The failure of ONA as a means of unbundling the BOCs' networks is illustrated vividly by the experience of ISPs that seek to provide broadband services. ISPs critically need the ability to establish high-speed connections to their residential and small business subscribers. In many cases, the only currently available technology for doing so is DSL. If ONA were working as planned, ISPs would have been able to obtain, on an unbundled basis, the network "building blocks" required to provide DSL-based high-speed Internet access service – such as a DSL-conditioned loops, central-office-based digital subscriber loop access multiplexers ("DSLAMs"), or other functionalities – through the ONA regime. This would have allowed ISPs to develop a wide array of innovative broadband Internet access services. This, of course, has not occurred. Rather, almost all ISPs have obtained end-to-end DSL services from the BOCs pursuant to wholesale tariffs. Simply stated, the ONA regime has been *irrelevant* to ISPs that seek to provide high-speed Internet access services.

Comparably Efficient Interconnection. The Commission has also eviscerated the CEI Plan requirement. In *Computer III*, the Commission provided that a BOC that wanted to provide basic telecommunications and information services on an integrated basis had an affirmative obligation to file a plan with the Commission that demonstrated that it would not engage in access discrimination.[89] ISPs and other interested parties had an opportunity to review the submission, and to file comments that raised questions and pointed out any obvious deficiencies

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[88] *See Filing and Review of Open Network Architecture* Plans, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 3084, 3085 (1990).

[89] *Computer III Phase 1 Order*, 104 F.C.C.2d at 1035-42.

before the BOC could provide the service. The knowledge that the Commission would rigorously review the BOCs' submissions and the public comments doubtless served as a potent deterrent to BOC abuse. The end-result was to prevent discrimination *before* it happens.

In an order released in March 1999, the Commission ruled that the BOCs are no longer required to file and obtain advance Commission approval of their CEI Plans.[90] Instead, the BOCs need merely post a copy of their plans on their websites.[91] If, after the service has been introduced, an ISP believes that a BOC is engaging in discriminatory conduct, the ISP's only recourse is to file a formal complaint pursuant to Section 208 of the Communications Act.[92] To do so, the ISP must gather information to document the discrimination, inform the BOC of its intention to file a formal complaint, and seek to negotiate a voluntary settlement with the BOC. If the negotiation is not successful, the ISP must prepare a detailed complaint and must participate in the Commission's often-protracted adjudicatory process.[93] This process is likely to deter all but the largest ISPs from challenging BOC discrimination. Moreover, even if a challenge is brought, during the pendancy of the adjudicatory process, the BOC's discrimination generally will continue unchecked. This procedure plainly does not provide meaningful protection for ISPs.

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[90] *See Computer II Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review of Computer III and ONA Safeguards & Requirements,* Report and Order, 14 FCC Rcd 4289, 4292 (1999) ("*Computer III Further Remand First Report and Order*").

[91] *Id.*

[92] *Id.* at 4297-05.

[93] *See* 47 U.S.C. § 208.

2. The Commission should give ISPs a limited right to purchase unbundled network features and functions used to provide broadband information services

Given the manifest failure of the ONA/CEI regime, the Commission should abolish it completely. In its stead, the Commission should adopt a new regime that gives ISPs a limited right to purchase specified features and functions of the ILECs' networks that can be used to provide information services, on an unbundled basis, at just and reasonable prices.

While ITAA has opposed proposals to give ISPs "carrier-like" Section 251 rights, ITAA has previously suggested that the Commission adopt a regime that gives ISPs: (1) the right to physically collocate ISP-provided equipment in the ILECs' central offices; (2) the ability to obtain unbundled switching and transmission links; (3) the right to "interposition" ISP-provided equipment between an end-user's CPE and an ILEC's central office; and (4) direct access to remote line concentration equipment, which is required to efficiently provide service to geographically concentrated groups of customers.[94] ITAA continues to urge the Commission to consider this proposal.[95]

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[94] *See* Comments of the Information Technology Association of America in response to *Further Comment Requested to Update and Refresh Record on Computer III Requirements,* Public Notice, DA 01-620 (Mar. 7, 2001), 66 Fed. Reg. 15,064 (2001) (Apr. 16, 2001) (citing Comments of ADAPSO, *Filing and Review of Open Network Architecture Plans*, CS Docket No. 95-20 at 52-53 (filed Apr. 18, 1988)).

[95] The "features and functions" proposal is part of a three-pronged strategy, advocated by ITAA, to better meet the needs of ISPs for competitive broadband telecommunications services. In addition to adopting the "features and functions" proposal, the Commission should take renewed measures to promote competition by CLECs and to establish a new category of provider, the Data Competitive Access Providers ("D-CAP"). Under this proposal, ILECs would be required to hand off aggregated data traffic that originates on a DSL-equipped loop to a D-CAP at the ILEC's central office remote terminal. The ILEC would be required to charge the D-CAP a cost-based interconnection rate that reflects its cost to: (1) strip off voice traffic (if required); (2) packetize and multiplex the data traffic onto the D-CAP's trunks so that the D-CAP can carry the traffic on its own high-capacity packet network; and (3) physically interconnect with the D-CAP. To deter discrimination, the ILECs would be required to charge the same rate when it hands this traffic off to its information service affiliate. This approach would allow D-CAPs to provide advanced packet transport service to ISPs without having to provide xDSL-based loops to end-users. By lowering the cost of entry, this approach would encourage companies to offer advanced telecommunications services. In addition to the D-CAP proposal, the Commission should continue to take effective actions to promote CLEC competition. In particular, the Commission should preserve the rules governing the ILECs' obligation, pursuant to

E. The Commission Should Reaffirm Its Existing Policies Regarding Preemption of State Regulation of Information Services

The Commission has requested comment regarding the extent to which State regulation of wireline broadband Internet access services can be, has been, or should be preempted.[96] As demonstrated below, the Commission should: (1) reaffirm that its preemption of State common carrier regulation of non-carrier-provided information service providers remains in effect, and (2) make clear that it will preempt State regulation of carrier-provided information services that would "thwart or impede" pro-competitive Commission policy. At the same time, the Commission should allow the States to supplement Commission enforcement and consumer protection efforts.

1. The Commission's preemption, in *Computer II,* of State regulation of non-carrier-provided information services remains in effect

In *Computer II*, the Commission concluded that the "efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if [information] services are free from public utility-type regulation."[97] The Commission therefore preempted States from imposing regulation in this area. This order – which applied to State regulation of information services provided by both carriers and non-carriers – was affirmed by the D.C. Circuit in *Computer and Communications Industry Association v. FCC.*[98] The Commission

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Section 251, to make unbundle network elements available for the provision of broadband wireline telecommunications services.

[96] *Notice* ¶ 62.

[97] *Computer II Further Reconsideration Order*, 88 F.C.C.2d at 541 n.34.

[98] 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

reiterated its preemption of State regulation of information services in the *Third Computer Inquiry.*[99]

A number of parties challenged the Commission's initial *Computer III Orders.* The petitioners in the case – which came to be known as *California I* – challenged "two discrete rulings,"[100] made by the Commission in original *Computer III Orders*: the lifting of the BOC structural separation requirement, and the preemption of State regulation of carrier-provided information services. The petitioners did not challenge the Commission's preemption of State regulation of non-carrier-provided information services. However, the court vacated, in their entirety, the *Computer III Orders* under review and remanded them to the Commission for further consideration.[101]

Shortly after the *California I* decision, the Commission held in the *BOC Computer II Waiver Proceeding*, that "[t]he vacation of the *Computer III* orders generally returns the industry and the Commission to a *Computer II* regime" – at least to the extent that the earlier rules are not inconsistent with the court's decision.[102] The Commission reiterated this conclusion in the *Computer III Remand Order*, observing that the *California I* decision did not question the regulatory classification of protocol conversion as an information service, and that it therefore had the effect of reinstating the Commission's decision in *Computer II* adopting that

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[99] *See Computer III Order*, 104 F.C.C.2d at 1126.

[100] *California I*, 905 F.2d at 1223.

[101] *Id.* at 1246.

[102] *In the Matter of the Bell Operating Companies' Joint Petition for Waiver of Computer II Rules*, 5 FCC Rcd 4714, 4714 (1990); *see Action on Smoking and Health v. Civil Aeronautics Board*, 713 F.2d 795, 797 (D.C. Cir. 1983) (A court decision that vacates rules promulgated by an administrative agency has "the effect of reinstating the rules previously in force.").

classification.[103] Just as *California I* effectively reinstated the *Computer II* decision regarding protocol conversion, *California I* also reinstated the Commission's *Computer II* decision to preempt State regulation of information services to the extent that it was not inconsistent with the court's decision.

The portion of the *Computer II* decision preempting State regulation of non-carrier-provided information services is consistent with the Ninth Circuit's decision in *California I.* While *California I* held that the Commission's preemption of all State regulation of *carrier*-provided intrastate information services in *Computer III* exceeded the Commission's authority under Section 2(b)(1) of the Communications Act,[104] the court was not called on to consider the validity of the Commission's preemption of State regulation of *non-carrier*-provided information services, and it did not suggest that there was any infirmity in this aspect of the *Computer III Order*. To the contrary, the court made clear that the restriction on the Commission's power contained in Section 2(b)(1) does not apply to services "provided by non-common carriers such as IBM."[105] "[T]he distinction made by the statute," the court emphasized, "is between . . . carriers and non-carriers."[106] Because the Commission's *Computer II* preemption of State regulation of non-carrier-provided information services is consistent with existing law, the preemption order remains in effect.

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[103] *Computer III Remand Proceedings*, 5 FCC Rcd at 7722.

[104] This provision limits FCC authority over "charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio *of any carrier*." 47 U.S.C. §152(b)(1) (emphasis added).

[105] *California I*, 905 F.2d at 1240.

[106] *Id.*

Events during the last two decades have demonstrated that the Commission's decision in *Computer II* was correct: information services competition has served the public interest. Today, thousands of companies offer Internet and other information services to customers across the nation. The vigorous competition among ISPs has resulted in the availability of an array of services at reasonable prices. And the lack of disparate State regulations has enabled ISPs to introduce new services quickly and to offer many of these services on a uniform, nationwide basis. Given this experience, the Commission should reaffirm that its *Computer II* preemption of State regulation of non-carrier-provided information services remains in effect – and is fully applicable to wireline broadband Internet access services.

2. The Commission should make clear that it will preempt State regulation of carrier-provided broadband Internet access services that would "thwart or impede" pro-competitive Commission policy

While the Ninth Circuit held in *California I* that the jurisdictional limitation contained in Section 2(b)(1) of the Communications Act restricts the Commission's ability to preempt State regulation of *carrier-provided* intrastate information services, it recognized an important qualification. The court found that the Commission may preempt State regulation of carrier-provided information services that "would necessarily thwart or impede' the FCC's goals."[107] Existing case law makes clear that, under the "thwart or impede" standard, the Commission may preempt any State regulation that, as a matter of economic practicality and operationally feasibility, could not co-exist with Federal requirements or policies. The Commission, moreover, is not required to wait until a State has adopted a specific regulation before it issues such an

[107] *Id.* at 1243 (quoting *NARUC III*, 880 F.2d at 430) (emphasis omitted).

order – but may, instead "preemptively preempt" States from adopting certain types of regulations.[108]

At the present time, there does not appear to be a need for the Commission to "preemptively preempt" the States from adopting any category of regulation applicable to carrier-provided broadband Internet access services. Nor does there appear to be any need for the Commission to preempt any existing State regulation. The Commission, however, should carefully monitor State activity in this area – and that it will not hesitate to preempt any State regulation applicable to carrier-provided information services that, as a practical matter, would thwart or impede achievement of pro-competitive Federal policies. At the same time, however, the Commission should allow States to continue to play a constructive, complimentary role in the regulation of broadband services.[109]

II. THE COMMISSION CANNOT REQUIRE BROADBAND INTERNET SERVICE PROVIDERS TO MAKE DIRECT PAYMENTS TO THE UNIVERSAL SERVICE FUND

Remarkably, at the same time the Commission is considering freeing the ILECs from their fundamental duties as common carriers, the Commission is also considering *imposing* one of the most basic common carrier obligations – the duty to make direct payments to the Universal Service Fund ("USF") – on non-regulated broadband Internet Service Providers. The Commission should decline to do so. As demonstrated below, because ISPs do not provide

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[108] *See generally,* J. Nadler, *Give Peace a Chance: FCC-State Relations After California III,* 47 Fed. Comm. L. J 457, 493-99 (1995) (describing the application of the "thwart or impede" standard).

[109] The recent decision of the California Public Utility Commission in *California ISP Association v. Pacific Bell Telephone Company,* Case 01-07-027 (Cal. PUC, Mar. 28, 2002), provides a good example of the kind of "co-operative federalism" that the Commission should promote. In this proceeding, the CPUC recognized that the FCC has jurisdiction over the rates, terms, and conditions on which Pac Bell provides DSL service pursuant to tariff, but that the State could enforce its requirements regarding service quality and unfair business practices, which were outside the scope of the federal tariff.

telecommunications or telecommunications services to anyone, the Commission does not have statutory authority to require broadband ISPs to make direct USF payments. Even if the Commission had the authority, moreover, its professed concerns about the sufficiency of the USF funding base and the need for "competitive neutrality" do not provide an adequate justification for abandoning its long-standing policy of treating ISPs as end-users, rather than carriers. To the contrary, imposing USF payment obligations on broadband ISPs would have significant adverse consequences.

A. Requiring ISPs to Make Direct Payments to the USF Would be Unlawful

Contrary to the suggestion in the *Notice,*[110] the Commission cannot use its "permissive authority" under Section 254(d) of the Communications Act as a basis to require broadband ISPs to make direct payments to the USF. Section 254(d) allows the Commission to require "*provider[s]* [of] interstate telecommunications . . . [to] contribute" to universal service.[111] ISPs, however, do not "provide" telecommunications to any party.

1. Wireline ISPs do not provide telecommunications

The Commission clearly lacks authority to require ISPs that use broadband telecommunications or telecommunications provided by facilities-based carriers to make direct payments to the USF. The drafters of the Telecommunications Act made clear that an entity that provides an information service is "offering . . . a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information."[112] While that

[110] *Notice* ¶ 71.

[111] *See* 47 U.S.C. § 254(d) (emphasis added).

[112] 47 U.S.C. § 153(20).

capability is made available "via telecommunications,"[113] this does not make an ISP a telecommunications provider. As the Senate Committee Report that accompanied in Telecommunications Act explained, "Information Service Providers do not 'provide' telecommunications services; they are users of telecommunications services."[114] Because ISPs do not *provide* telecommunications or telecommunications services to any party, the Commission cannot require them to make direct payments to the USF.

The possibility that an ISP may deploy its own "last mile" wireline transmission facilities does not change the analysis. As the Commission correctly observed in the *Notice,* an ISP "offering . . . service over its own facilities does not offer 'telecommunications' to anyone, it merely uses telecommunications to provide end-users with wireline broadband Internet access services."[115] Therefore, the Commission cannot require so-called "facilities-based ISPs" to make contributions to universal service.[116]

2. Cable-based ISPs do not provide telecommunications

The Commission has no basis to require cable system operators or ISPs that deliver service over a cable network to make direct payments to the USF.

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[113] *Id.*

[114] S. Rpt. 104-23, 104th Cong, 1st Sess., at 28 (1995). Further evidence that Congress did not intend for ISPs to be treated as telecommunications carriers comes from the fact that, in several places, the legislation clearly distinguishes telecommunications and information services. *See, e.g.*, 47 U.S.C. § 254(h)(2) (Commission to promote access to both "advanced telecommunications and information services.").

[115] *Notice* ¶ 25.

[116] This situation is entirely different from the situation in which a facilities-based *carrier* provides an information service. As discussed above, pursuant to Section 202 of the Communications Act, and the Commission's *Computer II* rules, the carrier is obligated to unbundle the telecommunications functionality and to provide it – to both affiliated and non-affiliated ISPs – as a telecommunications service. *See, supra,* §§ I.A & I.B.1. In that case, the carrier must make a payment to the USF based on the provision of telecommunications service "to itself" and to the non-affiliated ISP, just as it would if it provided the telecommunications service to any other customer.

The Commission has not determined whether the transmission functionality that a cable system operator provides to a non-affiliated ISP constitutes "telecommunications"[117] and whether to impose an obligation on cable system operators to offer that transmission functionality on an unbundled basis, as a telecommunications service.[118] Until the Commission resolves this issue, it would be premature to determine whether cable system operators should be required to make USF payments based on the provision of telecommunications or telecommunications services.

Regardless of how the Commission resolves that question, however, the Commission clearly cannot require ISPs that provide service over a cable system to make direct payments to the USF. As the Commission just recently concluded, "cable modem service" (*i.e.,* broadband Internet access service provided over a cable network) does not include the "offering of a telecommunications service to subscribers."[119] Therefore, just as with broadband wireline ISPs, because cable ISPs do not "provide" telecommunications or telecommunications service to anyone, the Commission lacks the statutory authority to require cable ISPs to make direct payments to the USF.

3. The Commission has not identified any "Internet telephony" offering that constitutes the provision of telecommunications services

At the present time, the Commission classifies all providers of so-called "Internet telephony" as either software vendors or ISPs, rather than as providers of telecommunications

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[117] *Notice* ¶ 54.

[118] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4844-49 (2002).

[119] *Id.* ¶ 39

service. Therefore, the Commission currently lacks the authority to require any Internet telephony providers to make direct payments to the USF.

The Commission has recognized that there are a number of ways in which voice traffic can be sent over the Internet.[120] Many of these configurations – such as those that involve use of software to send voice traffic between two Personal Computers ("PCs") – bear little resemblance to conventional voice telephony. The only common element is the use of the Internet protocol ("IP") to transport voice traffic. In the *Report to Congress on Universal Service*, however, the Commission determined that certain variants of Internet telephony services *may* meet the statutory definition of the term telecommunications service.[121] As a result, the Commission concluded that it may be appropriate to require these providers to make USF payments.[122] The Commission further recognized, however, that such determinations are best made on a case-by-case basis, in response to a formal complaint.[123] Until such time, the Commission will continue to treat all providers of Internet telephony services as ISPs.

To date, no party has presented the Commission with a complaint alleging that a specific provider of Internet telephony services is providing a service that constitutes "telecommunications." As a result, at the present time, the Commission has no basis to require any Internet telephony provider to make direct USF payments.

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[120] *Report to Congress on Universal Service,* 13 FCC Rcd at 11541-42.

[121] *Id.* at 11541.

[122] *Id.* at 11545.

[123] *Id.* at 11544-45.

B. The Commission has Failed to Provide an Adequate Justification for Imposing USF Payment Obligations on ISPs

Requiring ISPs to make direct payments to the USF would be a radical departure from well-established practice. Therefore, even if it had the legal authority, the Commission should not do so absent the most compelling policy justification. The *Notice* suggests that the Commission has two policy concerns. First, that the growth of broadband Internet access services could undermine the "funding base" of the USF.[124] And, second, that requiring some or all ISPs to make direct payments to the USF is necessary to ensure "competitive neutrality."[125] Neither of these concerns provides an adequate justification.

1. Concerns about sufficiency of the funding base do not justify imposition of USF payment obligations on ISPs

Under the current assessment system, a telecommunications carrier's obligation to make payments to the USF is assessed by multiplying each carrier's billed interstate and international end-user telecommunications revenues by a "contribution factor."[126] Some observers have expressed concern that the growth of broadband Internet access services could reduce carriers' end-user telecommunications revenues, thereby "eroding the base" from which USF revenue is derived. Concerns about the sufficiency of the funding base plainly do not provide a basis for the Commission to require ISPs to make direct payments to the USF.

Broadband has increased revenues. As an initial matter, the growth of broadband Internet access services has not decreased carriers' end-user revenues. To the contrary, by spurring demand for second lines, DSL, and other new services, the growth of the Internet has

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[124] *See, e.g., Notice* ¶ 82.

[125] *See, e.g., id.* ¶ 80.

[126] *See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9205-12 (1997).

significantly increased carriers' telecommunications revenues. Therefore, if anything, the growth of the Internet had expanded – rather than eroded – the USF funding base.

Internet telephony. In the *Notice,* the Commission has specifically expressed concern that the growth of Internet telephony services could erode the USF funding base.[127] There is no evidence that Internet telephony is having any discernible impact on carriers' end-user telecommunications service revenue. Despite growth in recent years, Internet telephony remains a niche service. In calendar year 2000, carriers reported approximately $81.7 billion in end-user interstate and international telecommunications revenue.[128] By contrast, one analyst estimates that IP telephony end-user revenues during that period totaled $310 million.[129] Thus, even if ISPs were required to make direct payments to the USF, the size of the funding base would increase by less than 0.4 percent.[130]

Connection-based regime. In a separate, but related, proceeding, the Commission has proposed to replace the current end-user telecommunications revenue assessment methodology with a methodology that bases USF contributions on the number and capacity of the "network

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[127] *See Notice* ¶ 82.

[128] *See Telecommunications Industry Revenues,* Report, Table 6. (rel. Jan. 2002) (total interstate revenue reported by universal service worksheet filers was $68,671,000,000; total reported international revenue was $13,014,000,000) *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/ telrev00pdf.

[129] *See* "Frost Predicts VOIP Revenue Growth" *XCHANGE, available at* http://www.x-changemag.com/hotnews/18h655944.html (posted Aug. 6, 2001) (citing estimate of analysts Frost and Sullivan that year 2000 revenues from retail voice over the Internet services of $273 million); *see also* "Voice-over-DSL maker Jetstream closes," CNET. News.com, *available at* http://news.com.com/2100-1033-883382.html (posted Apr. 15, 2002) (noting closing of largest provider of equipment used for voice-over-DSL applications).

[130] This figure likely over-states the carriers' revenue loss from Internet telephony. A significant portion of the voice traffic sent over the Internet represents traffic that would never have been sent over the public switched network and, therefore, would not have generated any end-user telecommunications revenue. Such traffic is typically originated by those subscribers for whom low price is more important than quality, reliability, or ease-of-use, such as students.

connections" that a carrier provides.[131] Adoption of the connection-based assessment methodology would obviate any concern about the long-term sufficiency of the USF. In its recent comments in support of the adoption of a connection-based approach, ITAA explained that:

> [B]ecause the number of network connections continues to rise, a connection-based assessment system will ensure a sufficient – and, indeed, growing – funding base. As a result, the per-connection assessment rate imposed on telecommunications carriers should remain reasonably constant over time. This, in turn, will make it possible to provide greater stability and predictability for telecommunications users – while removing the purported justification for imposing USF payment obligations on ISPs.[132]

In light of the above, concerns about the sufficiency of the USF funding base plainly do not provide an adequate justification for imposition of USF payment obligations on ISPs.

2. Concerns about competitive neutrality do not justify imposition of USF payment obligations on ISPs

The Commission, quite properly, has expressed concern that any USF assessment system must satisfy the statutory "competitive neutrality" requirement.[133] However, requiring telecommunications carriers to pay into the USF, while not requiring ISPs to do so, does not raise any question of competitive neutrality. Under the existing Commission rules, *all* providers – whether telecommunications carrier or non-carrier-affiliated ISPs – must make direct payments

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[131] *See Federal-State Joint Board on Universal* Service, Further Notice of Proposed Rulemaking and Report and Order, 17 FCC Rcd 3752 (2002).

[132] Comments of the Information Technology Association of America, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45 (filed Apr. 22, 2002) at 5. If the Commission adopts a connection-based methodology, the connection charge should be imposed only on carriers that provide a connection to end-users in order to provide telecommunication or a telecommunication service to the user. Consistent with long-established Commission rules, ISPs should be treated as end-users, not providers of telecommunication services. Thus, an ISP that deploys facilities solely for the purpose of providing an information service would not be obligated to pay a connection charge.

[133] *See* 47 U.S.C. § 254(d).

to the USF based on "end-user telecommunications revenue."[134] At the same time, *no* provider must pay into the fund based on revenue from the provision of Internet access service.[135]

While ISPs generally are not required to make direct payments to the USF, they make significant contributions to the advancement of universal service. Indeed, for many ISPs, payments to telecommunications carriers is the single largest cost of doing business.[136] The rates that ISPs pay to their carriers reflect the payments that the carriers must make to the USF. Requiring them to make direct payments to the USF would subject ISPs, alone among all users, to "double payment" obligations – the very opposite of competitive neutrality.

In light of the above, the proper approach is for the Commission to preserve the current regime, under which ISPs are not required to make direct payments to the USF. This conclusion is fully applicable to all ISPs – including so-called "facilities-based ISPs" and ISPs that provide their service over cable networks.

Wireline ISPs. In the *Report to Congress on Universal Service,* the Commission expressed concern that an ISP might "uneconomically self-provide telecommunications" in order to avoid the cost of contributing to universal service, thereby placing them at an unfair competitive advantage compared to ISPs that acquired telecommunications services from

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[134] The Commission has specifically found that an ISP that provides an end-user an information service and a "separate and distinct" interstate telecommunications service is obligated to make direct payments to the USF based on the revenue that it generates from the provision of the telecommunications service. *Federal-State Joint Board on Universal Service*, Fourth Order on Reconsideration, 13 FCC Rcd 5318, 5474 n.827 (1997).

[135] *See Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8776, 9205-9212 (1997) ("*Universal Service First Report and Order*").

[136] *See Notice* ¶ 74 ("ISPs that own no telecommunications facilities . . . do not contribute directly to universal service, but they make indirect contributions through charges paid to the underlying telecommunications carrier providing the leased telecommunications service.").

others.[137] The Commission recognized, however, that "there are significant operational difficulties associated with determining the amount of such an Internet service provider's revenues to be assessed for universal service purposes and with enforcing such requirements."[138] The Commission, therefore, did not seek to use its permissive authority to require "provider[s] of telecommunications" to support universal service as a basis to impose USF payment obligations "facilities-based ISPs."[139] The Commission should not alter that decision.

As an initial matter, there is no evidence that ISPs are deploying their own last mile facilities in order to avoid contributing to universal service. Indeed, given the substantial cost of doing so, and the level of risk that must be incurred, there is little reason to believe that many ISPs are likely to deploy their own last mile facilities in order evade these costs. Even if an ISP were to do so, however, it would still meet a significant portion of its need for telecommunications by obtaining services from other carriers, such as high-capacity links into the Internet. In that case, the ISP would continue to contribute to universal service, thereby reducing any competitive advantage it might obtain.[140]

Using the Commission's "permissive authority" to require providers of telecommunications to contribute to universal service as a basis to require "facilities-based ISPs" to make direct payments to the USF based on the value of the telecommunications that they

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[137] *Report to Congress on Universal Service,* 13 FCC Rcd at 11534.

[138] *Id.* This disadvantage results from the fact that, when an ISP acquires telecommunications services from a common carrier, the carrier typically "passes-through" its USF payments through the charges that it assesses the ISP. By contrast, if an ISP were to deploy its own telecommunications facilities – and use those facilities solely to provide information services – the ISP would not incur any USF payment obligation.

[139] *Id.* at 11534-35.

[140] Here, again, the payment that the ISP makes to its carrier will include a "pass-through" of the carrier's USF payments.

"provide to themselves" would represent an unprecedented expansion of the Commission's exercise of its authority. Until now, the Commission has carefully limited the obligation to make direct payments to the USF to common carriers and to those entities that *compete directly* against common carriers in the provision of *telecommunications* to third parties on a commercial basis. Thus, in the *Universal Service First Report and Order,* the Commission required entities that provide telecommunications for a fee on a private contractual basis to make direct payments to the USF based on end-user revenues. As the Commission explained, if a private network operator "provides telecommunications in competition with a common carrier . . . the principle of competitive neutrality requires that we should secure contributions from it as well as its competitors."[141]

Facilities-based ISPs, of course, do not compete against common carriers in the provision of *telecommunications*. Rather, they use telecommunications in order to provide an *information service*. Requiring an entity that derives no revenue from the provision of telecommunications to third parties to make direct payments to the USF plainly is not necessary in order to preserve the principle of competitive neutrality.

Whatever the merits of the Commission's concerns about competitive neutrality may be, requiring a facilities-based ISP to make direct payments to the USF based on the value of the telecommunications that it "provides itself" would presents significant – and, perhaps, insurmountable – administrative difficulties. When a carrier provides telecommunications to third parties on a contractual basis, there is no question as to how much end-user

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[141] *Universal Service First Report and Order*, 12 FCC Rcd at 9184.

telecommunications revenue the carrier receives.[142] By contrast, when a facilities-based ISP uses telecommunications solely to meet its internal needs, there is no reliable basis for assessing the "revenue" that it should include in the USF assessment base.

Cable ISPs. Concerns about competitive neutrality also do not provide a basis for requiring cable system operators that provide Internet access service to make direct payments to the USF. Competitive neutrality does not require *identical* treatment of all market participants. The Communication Act maintains significant distinctions among platform providers. Rather, the competitive neutrality requirement obligates the Commission to consider these differences and to develop a universal service funding regime that, on balance, neither significantly advantages nor disadvantages any particular class of competitors.

To be sure, the obligation to make direct payments to the USF imposes a significant burden on wireline carriers – and, ultimately, on ISPs that use these carriers' networks to provide information services. However, in the case of the ILECs, this burden is partly offset by the fact that the LECs continue to receive subsidies through the carrier access charge regime.[143] By contrast, cable system operators have their own set of benefits and burdens. While they may not have to make direct payments to the USF, they must often pay substantial franchise fees – which often have an assessment rate nearly as high as the current USF "contribution rate."[144] In

[142] Similarly, when an ILEC unbundles the telecommunications functionality that it uses to provide information services, and offers it as a tariffed service, the transmission-at-tariff requirement requires that the carrier use the tariffed rate to determine the revenue that it should include in the USF assessment base when it provides telecommunications service "to itself." In the case of a non-dominant common carrier, which provides service to third parties pursuant to contract, the contractual rate provides a reliable means to determine the revenue that it should include in the USF assessment base when it provides telecommunications service "to itself."

[143] *See Access Charge Reform,* Eleventh Report, 15 FCC Rcd 12962, 12977-78 (2000) ("*CALLS Order*").

[144] *See* 47 U.S.C. § 542(b) (setting cap on local franchise fees of five percent of gross revenues).

addition, cable system operators must forgo significant revenues in order to comply with requirements to devote capacity to so-called PEG (public interest, educational and government) and to public access programs.[145] Thus, the fact that cable system operators that provide Internet access services do not make direct payments to the USF does not necessarily violate the principle of competitive neutrality.

C. Requiring ISPs to Make Direct Payments to the USF Would Have Significant Adverse Consequences

Requiring ISPs to make direct payments to the USF would have a number of adverse policy consequences. In particular, it would: (1) constitute regulation of the Internet, which would be inconsistent with express congressional policy; (2) undermine the basis of the so-called "ESP exemption;" and (3) impede the U.S. Government's efforts to prevent the imposition of the an international settlements regime on the Internet.

1. Imposing carrier regulation on the Internet would contravene express congressional policy

In the Telecommunications Act, Congress clearly established, as a national policy, "preserv[ing] the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[146] The obligation to make direct payments to the USF is a fundamental part of the regulatory duties imposed on common carriers. Extending this obligation to broadband ISPs would be directly at odds with congressional policy and, doubtless, would lead to proposals for further regulatory intervention – at both the Federal and State levels.

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[145] *See id.* §§ 531, 535.

[146] *See id.* § 230(b)(2).

2. Treating ISPs as providers, rather than users, of telecommunications would undermine the foundation of the "ESP exemption"

Requiring broadband ISPs to make direct payments to the USF would have another adverse impact: it would undermine the basis of the so-called "ESP exemption" under which information service providers are allowed to obtain physically local telecommunications connections on the same terms as other business users, rather than having to pay the same above-cost carrier access charges as interstate interexchange carriers.[147]

From the beginning, the Commission has repeatedly and consistently concluded that ISPs are *users* of the telecommunications services, which – like a number of other end-users – connect jurisdictionally mixed private line networks to the local public switched telephone network.[148] Because ISPs are end-users, rather than carriers, they have always been allowed to pay the

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[147] As ITAA has repeatedly pointed out, the term "ESP exemption" – while convenient shorthand – mischaracterizes the access charge treatment of ISPs (as ESPs are now referred to). The Commission's 1983 *Access Charge Order* divided users of the local network into two categories: interexchange carriers and end-users. *See MTS and WATS Market Structure,* First Report and Order, 93 F.C.C.2d 241 (1983) ("*Access Charge Order*"), *aff'd sub nom. NARUC v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). End-users compensate local exchange carriers for their use of the local telephone network by paying a mix of flat-rate Federal end-user charges and State charges. Interexchange carriers, by contrast, are subject to the Commission's carrier access charge regime. *See CALLS Order,* 15 FCC Rcd at 12965-66 (The access charge regime was adopted "in lieu of" earlier agreements between the pre-divestiture AT&T and "MCI and the other long-distance competitors" regarding payment for the use of the local network "for originating and terminating interstate calls.") The Commission's carrier access charge rules, adopted in the 1983 Order, make *no mention* of ESPs – much less purport to "exempt" ESPs from paying carrier access charges. *See* 47 C.F.R. § 69.5(b) (2001) ("Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"); *id.* § 69.2(m) (defining an "end-user" as "any customer of an interstate or foreign telecommunication service that is not a carrier."). Rather, the Commission has consistently recognized that ISPs are users of the telecommunications network and, therefore, are entitled to access it on the same terms and conditions as other users. The Commission's treatment of ISPs stands in stark contrast to its treatment of resellers – which the agency has consistently classified as carriers. At the time it adopted the *Access Charge Order,* the Commission created an *express* exemption for resale carriers. *See Access Charge Order* at 344 (reprinting former Section 69.5 of the Commission's Rules). The Commission subsequently eliminated this exemption based on its conclusion that "resellers of private lines . . . [should] pay the same charges as those assessed on *other interexchange carriers* for their use of these local switched access facilities." *WATS-Related and Other Amendments of Part 69 of the Commission's Rules,* Second Report and Order, CC Docket 86-1, ¶¶ 11-14, *reprinted in* 60 Rad. Reg.2d (P&F) 1542, 1548-49 (rel. Aug. 26, 1986) (emphasis added).

[148] *See MTS and WATS Market Structure,* Memorandum Opinion and Order, 97 F.C.C.2d 682, 711-22 (1983).

ILECs the same combination of Federal and State charges as other end-users with comparable network configurations.[149] The Commission's treatment of ISPs as end-users has been affirmed twice – first by the D.C. Circuit in 1984 and again by the Eighth Circuit in 1998.[150] The Commission re-iterated its position in its 1998 *Universal Service Report to Congress*, observing that, because they are users of telecommunications, rather than providers, "information service providers are not subject to regulation as common carriers"[151] and therefore, are not required to pay carrier access charges.[152]

If the Commission were to reverse course and treat ISPs as telecommunication providers, rather than end-users, for *universal service* assessment purposes, the ILECs will no doubt argue that ISPs should be treated as telecommunications providers for *access charges* purposes. Requiring ISPs to pay above-cost, per-minute carrier access charges would make it difficult for ISPs to continue to offer subscribers offer low-cost, flat rate access to the Internet, thereby jeopardizing the continued growth and vitality of the Internet.[153]

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[149] The Commission has repeatedly rejected proposals to extend the carrier access charge regime to ISPs. *See, e.g., Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture; Policy and Rules Concerning Rates for Dominant Carriers,* Report and Order and Order on Further Reconsideration and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524, 4534-35 (1991) (rejecting claims that imposition of carrier access charges on ESPs would result in significantly lower charges to end-users); *Filing and Review of Open Network Architecture Plans,* Memorandum Opinion and Order, 4 FCC Rcd 1, 167-69 (1991) (ISPs "will continue to be able to take local business lines, or other state-tariffed access arrangements, instead of federal access, in the same manner as other end users."); *Amendment of Part 69 of the Commission's Rules Related to Enhanced Service Providers*, Order, 3 FCC Rcd 2631, 2632-33 (1988) (terminating docket opened to consider whether to extend carrier access charge regime to ISPs).

[150] *See Southwestern Bell Telephone Co. v. FCC,* 153 F.3d 523, 541-44 (8th Cir. 1998); *NARUC v. FCC,* 737 F.2d at 1136-37.

[151] *Report to Congress on Universal Service*, 13 FCC Rcd at 11511.

[152] *Id.* at 11552.

[153] *See generally* FCC Office of Plans and Policy, *The FCC and the Unregulation of the Internet*, OPP Working Paper No. 31 (July 1999) (describing the benefits that have resulted from the Commission's decision not to impose common carrier regulation of information service providers) *available at* http://www.fcc.gov/opp/workingp.html.

3. Requiring ISPs to make direct payments to the USF would undermine U.S. Government efforts to prevent imposition of regulatory "charging arrangements" on international Internet traffic

Finally, the Commission must consider the adverse international consequences of imposing carrier regulation on ISPs. In recent years, a number of international organizations and foreign operators have advanced proposals, generally referred to as International Charging Arrangements for Internet Services ("ICAIS"), that would extend the "international settlements regime" to the Internet.[154] The United States has opposed ICAIS on the grounds that the application of legacy telecommunications regulation – designed to govern the relationship between carriers in different countries exchange circuit-switched voice traffic – would impede the development of the Internet.[155] If the Commission were to reverse course and determine that ISPs should be treated in the same manner as telecommunications carriers for universal service purposes, it would be more difficult for the U.S. Government to counter the arguments made by ICAIS advocates that existing telephony regulation should be imposed on the Internet.

The far better course is for the Commission to reaffirm its long-standing position that information service providers do not provide telecommunications and, therefore, that it would be inappropriate to impose common carrier regulation on them. This position was correct when the Commission adopted it in *Computer II.* It remains correct today.

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[154] *See generally* FCC Office of Plans and Policy, *The Digital Handshake: Connecting Internet Backbones,* Working Paper No. 32, at 35-38 (Sept. 2000) (describing the ICAIS debate) *available at* http://www.fcc.gov/opp/workingp.html.

[155] *See id.* at 35.

CONCLUSION

For the foregoing reasons, the Commission should preserve – and, indeed, strengthen – the applicable *Computer II* regime. Specifically, the Commission should: (1) reaffirm that the *Computer II* regime is fully applicable to broadband services and that, under that regime, wireline broadband Internet access services are classified as information services; (2) continue to require ILECs to unbundle, and offer as tariffed services, the broadband telecommunications functionality that they use to provide information services; (3) continue to apply Title II requirements – including the Section 251 unbundling requirement – to ILEC-provided broadband telecommunication services, while refraining from extending common carrier regulation to ISPs; (4) replace the failed ONA/CEI regime with a system that ensures that ISPs can access ILEC network features and functions necessary to provide broadband information services; and (5) reaffirm that States are preempted from regulating non-carrier-provided information services, and that the Commission will preempt any State regulation of carrier-provided information services that, as a practical matter, thwarts or impedes pro-competitive Federal policy.

The Commission also should decline to extend Universal Service Fund payment obligations to providers of information services – whether provided over facilities obtained from facilities-based telecommunications carriers, facilities provided by cable system operators, or facilities deployed by the ISP itself.

Respectfully submitted,

INFORMATION TECHNOLOGY ASSOCIATION
OF AMERICA

By: ______________________

Jonathan Jacob Nadler
Angela Simpson
Squire, Sanders & Dempsey L.L.P.
1201 Pennsylvania Avenue, N.W.
Box 407
Washington, D.C. 20004
(202) 626-6838

Counsel for the Information
Technology Association of America

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